



Registry Doc. No.: 180

Date: December 15, 2020

Matter: CT-2019-005 – *The Commissioner of Competition v Parrish & Heimbecker, Limited*

Direction to Counsel (from Mr. Justice Gascon, Chairperson)

Re: P & H reply on efficiencies

FURTHER TO the application filed by the Commissioner of Competition (“**Commissioner**”) on December 19, 2019 against Parrish & Heimbecker, Limited (“**P & H**”), pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34, with respect to the acquisition by P & H of a primary grain elevator located in Virden, Manitoba (“**Application**”);

AND FURTHER TO the letter dated December 14, 2020 from counsel for the Commissioner regarding the reply witness statement of Mr. Heimbecker (“**Reply Witness Statement**”) delivered by P & H on December 11, 2020, in which the Commissioner requests that the Tribunal strike portions of the Reply Witness Statement as inappropriate lay opinion evidence;

AND FURTHER TO the December 14, 2020 email received from counsel for P & H responding to the December 14, 2020 letter from counsel for the Commissioner;

AND UPON considering the following:

1. On November 13, 2020, the Tribunal issued its Order Establishing a Further Amended Schedule for the Remaining Pre-Hearing Steps and the Hearing (“**Scheduling Order**”);
2. The Scheduling Order provided for a specific process to be followed with respect to P & H’s reply on the issue of efficiencies and notably ordered that: 1) by December 11, 2020, P & H had to serve and file its “reply expert report on matters related to efficiencies”; 2) the deadline for the Commissioner to file any motion arising from P & H’s reply expert report on matters related to efficiencies (“**Motion on Efficiencies Reply**”) is December 15, 2020; and 3) the hearing of any Motion on Efficiencies Reply will take place on December 18, 2020;
3. The Scheduling Order, all the other scheduling orders issued by the Tribunal in this Application, as well as Rules 74 and 77 to 79 of the *Competition Tribunal Rules*,

SOR/2008-141, make an express distinction between expert reports and witness statements;

4. Instead of serving and filing a “reply expert report on matters related to efficiencies”, as expressly contemplated and ordered by the Scheduling Order and by every other scheduling order issued by the Tribunal in this Application since the initial scheduling order dated March 4, 2020, P & H elected to serve and deliver the Reply Witness Statement, without seeking leave from the Tribunal to do so or seeking an amendment to the Scheduling Order;
5. For its part, instead of filing a Motion on Efficiencies Reply as contemplated and permitted in the Scheduling Order, the Commissioner elected to send his counsel’s December 14, 2020 letter without clearly indicating to the Tribunal or to counsel for P & H that this informal letter was apparently intended to replace the contemplated Motion on Efficiencies Reply;

AND UPON considering that the Tribunal has now issued its Order and Reasons on the November 27, 2020 motion of the Commissioner to strike certain paragraphs from the original witness statement of Mr. Heimbecker (“**Motion to Strike**”) on the basis of the record that was before it in relation to such motion (“**Order and Reasons**”), and that these Order and Reasons do not address the issues raised by counsel for the Commissioner in his letter of December 14, 2020 relating to the Reply Witness Statement;

AND UPON determining that, despite the failure of both parties to comply with the terms of the Scheduling Order and their respective unilateral decisions to submit materials not contemplated or permitted by the Scheduling Order, the Tribunal nonetheless agrees to do the following for the purpose of the process set out in the Scheduling Order with respect to P & H’s reply on the issue of efficiencies:

1. The Tribunal will accept that P & H provides to the Tribunal the Reply Witness Statement in lieu of filing the “reply expert report on matters related to the efficiencies” expressly referred to in the Scheduling Order;
2. The Reply Witness Statement will however be treated as any other witness statement by a lay witness and shall not be deemed to be an expert report;
3. The Tribunal will accept the Commissioner’s informal letter of December 14, 2020 in lieu of the Motion on Efficiencies Reply expressly referred to in the Scheduling Order;
4. Given the issuance of the Order and Reasons earlier today, and considering that they may have an impact on the submissions contained in the Commissioner’s informal letter of December 14, 2020, the Commissioner will have until 10:00 a.m. on Wednesday, December 16, 2020 to file any further motion materials and submissions with respect to the Reply Witness Statement;

AND UPON determining that the hearing already scheduled for December 18, 2020 with respect to any Motion on Efficiencies Reply shall take place;

THE TRIBUNAL DIRECTS AS FOLLOWS:

1. The Reply Witness Statement served by P & H on December 11, 2020 is accepted as being provided to the Tribunal in lieu of filing the “reply expert report on matters related to the efficiencies” expressly referred to in the Scheduling Order.
2. The Reply Witness Statement will not be treated as an expert report.
3. The Commissioner’s informal letter of December 14, 2020 is accepted for filing in lieu of the Motion on Efficiencies Reply expressly referred to in the Scheduling Order.
4. The Commissioner’s request that the Tribunal address his submissions challenging the statements made in the Reply Witness Statement as part of its Order and Reasons on the Commissioner’s Motion to Strike is denied.
5. The Commissioner is granted until 10:00 a.m. Ottawa time on Wednesday, December 16, 2020 to file any further motion materials and submissions with respect to the Reply Witness Statement.
6. P & H is to serve and file its responding record and its memorandum of fact and law by 1:00 p.m. Ottawa time on Thursday, December 17, 2020.
7. As contemplated in the Scheduling Order, the hearing of the Commissioner’s motion will be held on Friday, December 18, 2020, by way of video conference, and the hearing will begin at 1:00 p.m. Ottawa time, for a maximum duration of two (2) hours.
8. Each party shall have a maximum of one (1) hour for its oral submissions, and the Tribunal’s chess-clock method of managing the hearing time shall apply to the hearing of the Commissioner’s motion.
9. In light of the fact that P & H has not served and filed an expert report on matters related to efficiencies and will have no expert witness testifying on these matters at the hearing, the Tribunal will need to review and modify its December 3, 2020 Direction on the concurrent evidence session (“hot-tubbing”) for expert witnesses and will send proposed amendments to the parties for their consideration and comments before issuing an amended Direction.

Annie Ruhlmann
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